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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES HAGE,

Defendant and Appellant.

E071126

(Super.Ct.No. FVA1101520)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stanford E.

Reichert, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Charles Hage was convicted by a jury of first degree murder by discharging a firearm. This is defendant's second appeal. In his first appeal (*People v. Hage* (Feb. 5, 2018, E065468) [nonpub. opn.] (*Hage I*)), in pertinent part, defendant argued that this court should remand the matter for resentencing on his firearm enhancement (Pen. Code,¹ § 12022.53) allegation under recently enacted Senate Bill No. 620, which amended sections 12022.5, subdivision (c) and 12022.53, subdivision (h). The parties agreed in their supplemental briefs that the recent amendment applied in this case retroactively, because the amendment took effect before the judgment became final in the case. Accordingly, we remanded the matter to the trial court solely for the purpose of permitting the trial court to exercise its discretion as to whether to strike defendant's firearm enhancement allegation. In all other respects, we affirmed the judgment in defendant's first appeal.

On remand, the trial court denied defendant's request to strike his firearm enhancement allegation. Defendant appeals from the trial court's refusal to strike his firearm enhancement. Based on our independent review of the record, we find no error and affirm the judgment.

¹ All future statutory references are to the Penal Code unless otherwise stated.

II

FACTUAL AND PROCEDURAL BACKGROUND²

Defendant inherited two adjoining properties (the Hemlock properties) from his father. The two properties were located at 9985 and 9995 Hemlock Avenue in Fontana. Defendant's father had lived in the home at 9985 Hemlock. Hemlock Avenue runs north-south. The 9985 Hemlock property is directly north of the 9995 Hemlock property.

The house on the south property, located at 9995 Hemlock Avenue, appeared abandoned and dilapidated, with broken windows, tall weeds in front, and lots of scrap metal and junk in the front yard. The 9995 Hemlock property was used for storage of junk defendant's father had accumulated from swap meets, including metal pipe, scrap metal, and yard tools. The house appeared uninhabitable and the yard looked like a junkyard.

The house on the north property, 9985 Hemlock, appeared to be occupied and in much better condition. There was not as much junk on the 9985 Hemlock property. There was no fence separating the two parcels. A row of hedges and a shed separated the two lots. There was a white camper to the left of the shed, and a pathway behind the shed and camper. Each house had a driveway on the south side of each parcel. A fence ran along the front of the two properties. South of the 9995 Hemlock property, separated by

² The factual and procedural background is taken from this court's prior opinion in case No. E065468 unless otherwise indicated. (See *Hage I, supra*, E065468.)

a fence, was a truck yard. There was an adult bookstore south of the truck yard, on the corner of Hemlock and Valley Boulevard (Valley).

Defendant checked on the Hemlock property two or three times a week but rarely spent the night there. The property had been broken into many times, with scrap metal and tools stolen from the yard. The police were called numerous times. Nails were glued to the top of the fence to keep people from jumping the fence.

Jerry Ruiz and Yvette Gallardo rented a house from defendant at 9962 Hemlock. Their rental was across the street from the 9995 Hemlock property. While defendant was collecting the rent from Gallardo in 2009, Gallardo suggested defendant get a dog to keep intruders from stealing from defendant's Hemlock property. Defendant responded, "If I ever catch someone, I'll shoot 'em." In 2011, Ruiz saw defendant on the property a couple of times, usually on Saturdays and Sundays. On a couple of occasions, Ruiz saw people stealing scrap metal and wire from the Hemlock property at nighttime. Gallardo had also seen people jumping the fence and taking things from defendant's Hemlock property.

Before Ruiz left for work at 9:30 p.m., on August 24, 2011, the night of the shooting, Ruiz called defendant and told him he had seen two men on defendant's property that night. During two previous conversations, Ruiz had told defendant people were jumping over the fence and taking all kinds of things. This made defendant angry.

James Shiflet, who was married to defendant's cousin, lived three doors down the street from defendant's Hemlock property. Shiflet noticed defendant arrive on his

motorcycle at the Hemlock property about twice a week. Defendant had told Shiflet there was a gun on the property. Defendant's father had kept a small caliber firearm on the property. Six months before the shooting incident, Shiflet suggested to defendant that defendant get some dogs because of the thefts in the neighborhood. Defendant indicated he did not need dogs because he had a gun. Shiflet and defendant's neighbors had noticed two people repeatedly breaking into the Hemlock property and stealing wire and scrap metal.

A. The Shooting

Between 1:00 and 2:00 a.m. on August 25, 2011, Bruce Harcrow and Theodore Goede drove to defendant's 9995 Hemlock property, intending to steal metal pipes and a sawzall (a battery operated saw). Goede parked his white Ford Bronco on Hemlock. Harcrow did not realize someone was actually staying at the house on the 9985 Hemlock property. Goede and Harcrow did not go over to that house. Harcrow and Goede stayed in front of 9995 Hemlock. The night of the shooting, there was no vehicle parked in front of or in the driveway of the 9995 Hemlock property. Goede threw his duffel bag containing tools over the chain link fence, onto the driveway of the 9995 Hemlock property. The bag made a loud metallic noise when it landed on the driveway, but there did not appear to be any sign of activity from anyone on the Hemlock property in response to the noise. The property was very dark.

After three sheriff's cars drove by, Harcrow got nervous and told Goede it was not the right time for the theft. Goede and Harcrow left in the Bronco and returned about half

an hour later. Goede parked about 200 feet south of defendant's property. Goede climbed over the fence, intending to retrieve his bag of tools and take a sawzall and metal pipes (scrap metal) from defendant's 9995 Hemlock property. Harcrow waited outside the fence. Neither Goede nor Harcrow had a weapon.

The moment Goede walked behind the shed out of Harcrow's sight, Harcrow saw a bright blue flash and heard a popping sound. Harcrow did not hear anyone speak. Goede stumbled backwards, turned, ran towards the fence, and climbed over it. He did not have anything in his hands. While on top of the fence, Harcrow heard additional shots and saw sparks from a gun. Harcrow ran south towards Valley. As he ran, he heard gunshots and heard Goede say, "Okay, okay, okay," and more gunshots. Harcrow ran inside the adult bookstore on Valley and told the clerk to call 911. Harcrow then ran to an open field on Valley and hid, while calling 911.

Gabrial Ortiz testified that between 2:30 and 2:45 a.m. that night, he was hanging out with his brother, Joel, and some friends in front of his home about a quarter of a mile north of defendant's Hemlock property. They heard a couple of gunshots and then saw two people running on Hemlock. One of the two men was bobbing and weaving as he ran. Then there was a second volley of shots. One of the two men appeared repeatedly to get up and fall down. Joel also testified it looked like one of the men was chasing the other, shooting at him. Joel saw someone fall, and then repeatedly get up and fall, until he could no longer see the person.

Gabrial's friend, Andy Buenrostro, drove in his car to the shooting scene to see if anyone was hurt. Andy saw an older man with gray hair and a beard holding a revolver near the adult bookstore. Andy returned to Gabriel's home, reported what he saw, warned the others not to go down the street, and left.

After five or 10 minutes, Gabriel and his guests drove to the shooting scene. They did not see anyone with a gun. They found Goede lying in the street on Hemlock, in the gutter near the adult bookstore. He appeared to be dead, with bullet holes in his torso. Gabriel and Joel did not notice any weapons around him. Gabriel called 911. About a minute later, law enforcement arrived.

At around 2:45 p.m., officers Hunt and Goines arrived at the crime scene. They found Goede lying in the street, in the gutter on Hemlock. He appeared to be dead, with gunshot wounds to his chest. No weapons or shell casings were found near his body. Sheriff's Sergeant Landen testified that a revolver does not expel shell casings. The casings remain in the revolver. Landen further testified that at around 3:15 a.m., he responded to a dispatch call reporting that there was a dead body on Hemlock. The body was on the curb, about 100 feet from 9995 Hemlock, and 500 feet from the adult bookstore.

A forensic pathologist determined that Goede had two gunshot wounds. One gunshot entered his chest and passed through his heart and lung. The other entered his upper back. The pathologist testified that Goede could have continued moving for up to 20 to 30 seconds after the two wounds. Goede was under the influence of

methamphetamine when he was shot. The pathologist testified that a person shot in the heart could run 10 feet and scale a six-foot fence before becoming incapacitated. A .22-caliber bullet which could have been fired from a revolver manufactured by Rohm was recovered from defendant's body.

Sergeant Niles testified that during an investigation of the shooting incident, he executed a search warrant at 9985 Hemlock and found 282 rounds of .22-caliber ammunition in the house, with boxes of ammunition open. There was .22-caliber ammunition in a box on a table next to the head of the bed and a motorcycle jacket at the base of the bed.

During the morning of August 25, 2011, after the shooting incident, Harcrow approached Sheriff's Detective Myler, near defendant's Hemlock property, and told him that Goede called him at 9:30 p.m. the night before and said he wanted to steal some metal from an abandoned house. During the early morning hours of August 25, 2011, Harcrow and Goede went to defendant's property to steal some items. During a second interview, Harcrow told Myler that Goede placed a duffel bag containing tools in the back of his Bronco. They drove to defendant's Hemlock property and Goede threw his duffel bag over the fence after unsuccessfully attempting to open the gate. When the bag landed on the ground it made a loud metallic noise. Harcrow and Goede then left to visit a friend. After discovering the friend was not home, they drove back to the adult bookstore, parked the Bronco, and walked back to defendant's Hemlock property.

B. Defendant's Two Interviews

Landen interviewed defendant on August 25, 2011, at 9985 Hemlock. Defendant stated that people had repeatedly entered his Hemlock property and had stolen whatever they wanted. Defendant believed that someone broke into his trailer on the property on August 25, 2011, and the “son-of-a bitch” left the canvas bag on defendant’s property. The duffel bag contained empty smaller bags. Defendant said people “keep cutting the [gate] chains” and “help themselves to whatever my dad had here.” Defendant glued nails to the fence to keep people from jumping the fence. On one occasion at night, he confronted someone behind his camper and threatened to break the person’s knee caps with a stick. Defendant had also told someone he would bash the person on the head if he caught him on his property. Defendant acknowledged his father and stepmother might have had guns on the property, but defendant denied carrying a gun.

Defendant further stated that on August 24, 2011, he arrived at the property at about 10:45 p.m. and parked his motorcycle in front of the 9985 property. At 11:30 p.m., defendant took Flexeril, a muscle relaxant, for his back. The medication “knocked [him] out.” He did not wake up until the next morning, after the police arrived. He did not learn there was a shooting or hear anything about it until then. Defendant found a large canvas bag just inside his gate at 9985 Hemlock. Defendant moved the bag to outside the gate.

Landen told defendant that witnesses had said the victim was shot on defendant’s property, and all of the officers had left by daylight. Therefore defendant would not have seen them that morning, as he claimed. Defendant denied having a gun, denied shooting

the victim, and denied being awake during the shooting. Defendant admitted he had removed from the canvas bag smaller bags containing tools. Defendant also admitted he was “pissed off” from people coming on his property and taking things.

Landen interviewed defendant again on September 9, 2011, at the sheriff’s station. Landen told defendant he was under arrest and read him his *Miranda* rights. Defendant became emotional and began crying. Landen asked why defendant was crying. Defendant said it was because he killed someone. Defendant then told him a different story from that which he had told Landen previously. Defendant said he went outside to feed the cats around 11:00 p.m. and stepped on a revolver lying on the driveway of the 9995 Hemlock property. Defendant did not know where it came from. He put it in his pocket, went inside, took Flexeril, and went to sleep. Defendant woke up a few hours later, used the restroom, and then went outside because it was hot. Defendant heard a noise and someone shined a flashlight in his face. Fearing for his safety, he took the gun out of his pocket and fired it to protect himself. Defendant apologized for lying during his first interview. He said he lied because he had a felony conviction and because someone had died.

After his second interview, defendant accompanied Landen and other officers to the 9995 Hemlock property and showed them where he had placed the gun. The officers recovered the gun from a cat box, where defendant had said he placed it. The gun contained four discharged bullet casings and two live rounds. There was no documentation revealing to whom the gun was registered.

C. Defendant's Trial Testimony

Defendant's trial testimony was consistent with his second interview. Defendant further testified to the following. He lived in Yucaipa but occasionally visited the Hemlock property. Thieves were entering the Hemlock property and stealing items. Defendant reported the thefts to the police but the stealing continued. Ruiz and his wife kept defendant informed of intruders on his property. Ruiz had called him numerous times to tell him people were on his property. Defendant glued nails to the top of the fence, placed barbed wire on his fence, and placed locks on the front gates. There was an ADT security sign and a "Beware of Dog" sign, but no dog. Defendant denied telling Shiflet he did not need a dog because he had a gun.

When defendant arrived at the Hemlock property at about 10:45 p.m., on August 24, 2011, he walked around the property and did not notice anything was amiss. He stepped on a loaded revolver in the driveway of the 9995 property and put it in his back pocket. He had never seen the gun before. After walking around the property, defendant took Flexeril for his back pain and went to sleep at the 9985 Hemlock property. After waking up to go to the bathroom, he went outside to cool off. He heard what sounded like someone hitting the gate in front of 9995 Hemlock. It was dark and he did not have a flashlight. Defendant walked in the dark down the walkway toward the 9995 property. Suddenly, someone shined a light in his eyes and said, "you son of a bitch." He did not hear anyone say, "okay, okay, man."

Because defendant feared for his life, he fired the gun two or three times towards the light. He could not see anyone because he was seeing spots from the flashlight. He heard the fence shaking and assumed he had scared off the intruder. Defendant threw the gun in a nearby cat box, went inside the 9985 Hemlock residence, locked the door, and went to sleep.

Defendant did not plan on shooting anyone beforehand. He forgot the gun was in his pocket until he panicked when Goede shined a light in his face and called him a “son of a bitch.” Defendant did not know if Goede had a weapon and feared Goede might kill him.

After the shooting, defendant did not call the police because he feared adverse repercussions from unlawfully possessing a gun with a 1989 felony conviction, and feared he might have killed someone. He first realized he might have shot someone the next morning when he went outside and saw police activity and crime scene tape. Defendant was trained in the use of firearms in the navy. Defendant owned several firearms.

D. Stipulated Facts

The parties stipulated to the following facts. Defendant was present at 9995 Hemlock, beginning at 10:30 p.m. on August 24, 2011, through the entirety of August 25, 2011. During that time, defendant possessed 282 rounds of .22-caliber ammunition and a Rohm .22-caliber revolver. The revolver could hold six rounds of ammunition. Defendant was convicted of a felony offense in 1989, which disqualified

him from ownership or possession of a firearm. During Goede's autopsy, a .22-caliber bullet was found in his body. The bullet could have been fired from a revolver manufactured by Rohm. Goede owned the white Ford Bronco parked in front of 10025 Hemlock. Inside the vehicle was a baggie containing .11 grams of methamphetamine and a small glass pipe commonly used to smoke methamphetamine.

E. *Procedural Background*

Following a jury trial, defendant was convicted of first degree murder (§ 187, subd. (a); count 1). The jury also found true three firearm allegations. Specifically, the jury found true that during the commission of the murder, defendant personally used a firearm and discharged it, causing death (§ 12022.53, subds. (b)-(d)).³ Defendant pled guilty to counts 2 through 4 for possession of a firearm by a felon (§ 12021, subd. (a)(1)); possession of ammunition (§ 30305, subd. (a)(1)); and failure to register each residence (§ 290.010). The trial court struck one of the firearm allegations and two prior strike allegations. The trial court sentenced defendant to 50 years to life in prison, consisting of 25 years to life for the substantive offense plus a consecutive 25 years to life for the firearm enhancement allegation.

Defendant subsequently appealed arguing, in relevant part, that this court should remand the matter for resentencing on his firearm enhancement (§ 12022.53) under recently enacted Senate Bill No. 620, which amended sections 12022.5, subdivision (c)

³ We take judicial notice of the records in defendant's prior appeal in case No. E065468 pursuant to Evidence Code section 452, subdivision (d).

and 12022.53, subdivision (h). We agreed with the parties, and accordingly ordered the matter remanded to allow the trial court to exercise its discretion as to whether to strike defendant's firearm enhancement. In all other regards, we affirmed the judgment.

On remand, following a hearing on July 26, 2018, the trial court denied defendant's request to strike his firearm enhancement allegation in the interest of justice. The court explained: "When I look at the three factors: The crime itself, the jury findings, and the fact that [defendant] should not have had a gun in the first place, the Court finds a basis to impose the enhancement in the interest of justice. [¶] The jury did not accept . . . any of [defendant's] self-defense arguments whatsoever. They found essentially, as the Court of Appeal notes, that [defendant] was lying in wait, ambushed Mr. Goede . . . and shot him as he was running away. And when I take those factors into account with respect to the commission of the crime and with respect to the jury findings, there is not a basis on which the Court can exercise its discretion not to impose the enhancement under [section]1202[2].53." The trial court was mindful of defendant's advanced age, defendant's health problems, and that defendant will be 106 years old with the 25-year-to-life sentence when he comes up for parole with or without the firearm enhancement. The court noted that the law had to take into consideration "not only the circumstances of [defendant's] health and his current health problems, but also the facts of the crime itself and the commission of the crime."

On August 13, 2018, defendant filed a timely notice of appeal.

III

DISCUSSION

After defendant appealed, upon his request, this court appointed counsel to represent him. Upon examination of the record, counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issue, and requesting this court to conduct an independent review of the record.

We offered defendant an opportunity to file a personal supplemental brief, and he has not done so.

An appellate court conducts a review of the entire record to determine whether the record reveals any issues which, if resolved favorably to defendant, would result in reversal or modification of the judgment. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-442; *People v. Feggans* (1967) 67 Cal.2d 444, 447-448; *Anders v. California, supra*, 386 U.S. at p. 744; see *People v. Johnson* (1981) 123 Cal.App.3d 106, 109-112.)

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the entire record for potential error and find no arguable error that would result in a disposition more favorable to defendant.

IV

DISPOSITION

The trial court's order denying defendant's request to strike his firearm enhancement allegation is affirmed.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.